

No. 16493 ✓

---

United States  
Court of Appeals  
for the Ninth Circuit

---

WESTERN MOTOR SERVICE CORPORA-  
TION,

Appellant,

vs.

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a Corporation,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
District of Arizona

FILED

SEP 25 1959

PAUL P. O'BRIEN, CLERK



No. 16493

---

---

United States  
Court of Appeals  
for the Ninth Circuit

---

WESTERN MOTOR SERVICE CORPORA-  
TION,

Appellant,

vs.

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a Corporation,

Appellee.

---

Transcript of Record

---

Appeal from the United States District Court for the  
District of Arizona



## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	<b>PAGE</b>
Amended Answer and Counterclaim.....	16
Answer and Counterclaim.....	10
Answers to Interrogatories Filed December 31, 1958 .....	22
Answers to Interrogatories Filed January 19, 1959 .....	26
Attorneys of Record.....	1
Certificate by Clerk.....	30
Interrogatories by Plaintiff Filed December 16, 1958 .....	19
Interrogatories by Plaintiff Filed January 19, 1959 .....	24
Motion to Amend Complaint.....	26
Motion for Change of Venue.....	15
Notice of Appeal.....	29
Order Granting Motion for Stay of Execution.	33
Order for Summary Judgment.....	28
Petition for Removal of Civil Action.....	3
Complaint .....	6
Statement of Points on Which Appellant In- tends to Rely.....	32



ATTORNEYS OF RECORD

THOMAS F. TOBIN,  
30 Plaza Place,  
Scottsdale, Arizona,

Attorney for Appellant.

GUST, ROSENFELD, DIVELBISS AND  
ROBINETTE,  
LAWRENCE B. SMITH,  
323 Security Building,  
Phoenix, Arizona,

Attorneys for Appellee.





In the United States District Court  
For the District of Arizona

No. Civ. 2830 Phx.

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a California Corporation,

Plaintiff,

vs.

WESTERN MOTOR SERVICE CORPORA-  
TION, a Nevada Corporation,

Defendant.

PETITION FOR REMOVAL OF  
CIVIL ACTION

To: The Honorable The United States District  
Court, for the District of Arizona:

The petition of defendant, a corporation, here-  
inafter called "petitioner," respectfully shows:

I.

That this is a civil action brought by Land De-  
velopment and Investment Co., as plaintiff, to re-  
cover from petitioner, as defendant, the sum of Five  
Thousand Thirty-four  $91/100$  Dollars (\$5034.91)  
alleged to be due under a lease agreement between  
plaintiff and petitioner, all as more particularly  
appears from the true copy of plaintiff's Complaint  
filed herewith.

II.

That the amount in controversy at the time of  
commencement of this action exceeded and now

exceeds the sum of Three Thousand Dollars (\$3000.00), exclusive of interest and costs.

### III.

That plaintiff was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and resident thereof, and petitioner was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada, and a citizen and resident thereof.

### IV.

That the action was commenced by the filing of plaintiff's Complaint in the Superior Court of the State of Arizona, in and for the County of Maricopa, Docket No. 97820, on the 17th day of February, 1958, all as more particularly appears from the true copy of the Summons filed herewith. Said Summons was served upon petitioner on the 17th day of February, 1958. This petition is filed within twenty (20) days after service of process. Petitioner has not moved, answered, pleaded or otherwise appeared in said Superior Court of Arizona.

### V.

That, by reason of the foregoing, this is a civil action of which the district courts of the United States are given original jurisdiction and is removable to this court.

VI.

That petitioner presents herewith a cashier's check, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VII.

That upon the filing of this petition and check aforesaid, petitioner is giving written notice thereof to all adverse parties and is filing a copy of this petition with the Clerk of the Superior Court of the State of Arizona, in and for the County of Maricopa.

VIII.

That copies of all process, pleadings and orders served upon petitioner in this action are filed herewith.

Wherefore, petitioner prays that this action be removed to this Court and that said Superior Court of Arizona, in and for the County of Maricopa, shall proceed no further unless this case is remanded.

Dated this 8th day of March, 1958.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

In the Superior Court of Maricopa County  
State of Arizona

No. 97820

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a California Corporation,

Plaintiff,

vs.

WESTERN MOTORS SERVICE CORPORA-  
TION, a Nevada Corporation,

Defendant.

### COMPLAINT

Comes now the plaintiff, and for cause of action against the defendant, complains and alleges as follows:

#### I.

That plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in San Francisco, California; that the defendant is now, and during all the times herein mentioned was a Nevada Corporation, duly organized and existing by virtue of the laws of the State of Nevada, and plaintiff is informed and believes, and therefore alleges, that said defendant is now and at all times stated herein, has been duly and regularly licensed to do business in the State of Arizona.

## II.

That plaintiff is and at all times herein mentioned was the owner of that certain building of which the premises hereinafter described are a part.

## III.

That on or about January 15, 1953, plaintiff herein, by written Lease, leased to defendant herein those certain portions of that certain brick and frame building, situated on the northerly line of Folsom Street, between Eighth and Ninth Streets, generally known as 1228 Folsom Street and 723 Clementina Street, San Francisco, California. That said Lease was for a term of five (5) years, commencing February 15, 1953, and under the terms of said Lease defendant herein agreed to pay the sum of Seven Hundred (\$700.00) Dollars per month, commencing on the 15th day of February, 1953, and a like sum of Seven Hundred (\$700.00) Dollars on the 15th day of each and every succeeding month thereafter, to and including the 15th day of January, 1958.

That further, in and by the terms and provisions of the Lease, the defendant did agree that in the event of any increase during any year of the term of the Lease in the real estate taxes assessed against the property of which the leased premises form a part, over and above the amount of such taxes assessed for the fiscal year of 1952-1953, that said Lessee should thereafter, during the term of said Lease, pay to Lessor the full amount of such

increase, and that said payment shall be deemed and considered to be additional rent under said Lease. That there was an increase in said real estate taxes assessed by the City and County of San Francisco, over said taxes so assessed for the fiscal year 1952 to 1953, for the fiscal years 1955-1956, 1956-1957, and 1957-1958, in the amounts of Two Hundred Thirty-one and  $94/100$  (\$231.94) Dollars, Two Hundred Thirty-seven and  $47/100$  (\$237.47) Dollars, and Three Hundred Sixty-five and  $50/100$  (\$365.50) Dollars, respectively.

That by reason of the foregoing, the defendant became obligated for additional rental in the sum of Eight Hundred Thirty-Four and  $91/100$  (\$834.91) Dollars.

#### IV.

That defendant has not paid any rental for the periods commencing August 15, 1957, September 15, 1957, October 15, 1957, November 15, 1957, December 15, 1957, and January 15, 1958, at said rate of Seven Hundred (\$700.00) Dollars per month, and the total sum of Four Thousand Two Hundred (\$4,200.00) Dollars, being rental for said periods, together with additional amount of taxes hereinabove mentioned, in the sum of Eight Hundred Thirty-Four and  $91/100$  (\$834.91) Dollars, or a total sum of Five Thousand and Thirty-Four and  $91/100$  (\$5,034.91) Dollars, is due, owing and unpaid from the defendant to plaintiff, although often demanded.

V.

That in and by the terms and provisions of said Lease, the defendant did agree that in case suit should be brought for the recovery of any rental due under the provisions hereof, that defendant would pay to Lessor, a reasonable attorney's fee to be assessed by the Court as part of the costs of such suit. That a reasonable fee to be allowed herein as attorney's fees, is the sum of Seven Hundred Fifty (\$750.00) Dollars.

Wherefore, plaintiff prays for judgment against the defendant in the sum of Five Thousand and Thirty-Four and 91/100 (\$5,034.91) Dollars, together with interest on each installment thereof, from the date the same became due, at the rate of six per cent (6%) per annum, and for an attorney's fee herein, in the sum of Seven Hundred Fifty (\$750.00) Dollars, and for costs of suit herein incurred, and for such other and further relief as may be meet and proper in the premises.

GUST, ROSENFELD, DIVEL-  
BESS & ROBINETTE,  
328 Security Building,  
Phoenix, Arizona.

By .....  
Attorneys for Plaintiff.

[Endorsed]: Filed March 10, 1958.



[Title of District Court and Cause.]

## ANSWER AND COUNTERCLAIM

Comes now the defendant in the above-entitled matter and, answering the complaint on file herein, admits, denies and alleges the following:

### I.

Defendant admits the allegations of Paragraphs I and II.

### II.

Answering Paragraph III, defendant denies that said lease was for a term of five (5) years, commencing February 15, 1953, and under the terms of said Lease defendant herein agreed to pay the sum of Seven Hundred (\$700.00) Dollars per month, commencing on the 15th day of February, 1953, and a like sum of Seven Hundred (\$700.00) Dollars on the 15th day of each and every succeeding month thereafter, to and including the 15th day of January, 1958.

### III.

Answering Paragraph IV, defendant denies that Five Thousand and Thirty-four and 91/100 (\$5,034.91) Dollars is due, owing and unpaid from the defendant to plaintiff. Defendant alleges that by the terms of said lease defendant was never obligated to pay a Seven Hundred Dollar rental to defendant on January 15, 1958, and further denies liability as to other rental periods named in Complaint.



IV.

Answering Paragraph V, defendant denies that the sum of Seven Hundred Fifty (\$750.00) Dollars is a reasonable figure and alleges that any sum in excess of Three Hundred (\$300.00) Dollars is unreasonable.

As for a Second, separate and distinct defense, said defendant alleges the following:

I.

That defendant herein, as lessee, and plaintiff herein as lessor, entered into a written lease covering the premises referred to in plaintiff's complaint herein on January 15, 1953.

II.

That lessee has faithfully fulfilled its duties for many years in maintaining the elevator in accordance with the terms of the lease requiring it to maintain the elevator.

III.

That in and by the terms and provisions of said lease, the defendant, as lessee, did not have the duty to replace the elevator in whole or in part.

IV.

That the loss of the use of the elevator constituted a deprivation of the premises to the defendant resulting in a failure of consideration as concerns defendant's liability; that the building in question was a specific purpose building leased specifically

for warehouse purposes and was of no value to the defendant without elevator service; that the second floor of said building contained much greater footage than the first floor (approximately two-thirds ( $\frac{2}{3}$ ) of the total area concerned) and that because the elevator constituted the only freight entrance to the second floor the destruction of said elevator resulting from an explosion within the hydraulic system constituted a partial destruction of the premises.

V.

That in and by the terms and provisions of Paragraph Fifteenth of said lease the lessor has the duty to replace the elevator. Paragraph Fifteenth of the lease provides in part:

“That in the event of a partial destruction of the said premises during the said term from any cause, the lessor shall forthwith repair the same provided such repairs can be made within 60 days under the then existing laws and regulations. \* \* \* In the event of any dispute between the lessor and lessee relative to the provisions of this paragraph, they shall each select an arbitrator, the two arbitrators so selected shall select a third arbitrator, and the 3 arbitrators so selected shall hear and determine the controversy \* \* \*”

Webster's New International Dictionary defines “destruction” as “a bringing to naught, ruin, demolition.” So far as the lessee was concerned the elevator was in a state of complete destruction and it made no difference whether the elevator had some

working parts or not. Therefore, with the elevator destroyed a partial destruction of the premises resulted which Paragraph Fifteenth provides will be repaired by the Lessor. It should be noted that Paragraph Fifteenth specifically states that if the premises are partially destroyed from any cause, the lessor has the obligation of repair. It, therefore, cannot be successfully argued that to come within the definition, the destruction must be caused by a calamity or act of God. If such was the intention of the parties, then that language should have been used. If Paragraph Fifteenth were not in the lease, Section 1932 of the Civil Code of California would have allowed the lessee to terminate the lease when a material portion of the consideration for the lease perished. In other words, if Paragraph Fifteenth did not abrogate the rights granted by Section 1932 to the lessee, then the lessee would have had the right to terminate this lease. Since that paragraph takes away a right granted to the lessee, it should be construed favorably towards the lessee. Since no paragraph in said lease requires defendant, lessee, to replace the elevator Paragraph Fifteenth placed that burden upon the lessor.

For a counterclaim to the complaint of plaintiff herein defendant alleges that between the 16th day of May, 1956, and the 15th day of July, 1957, the defendant paid to plaintiff Ten Thousand and Fifty (\$10,050.00) Dollars. Defendant alleges a complete failure of consideration for the deposits of rental so paid which discharged him from his duty to con-

tinue payments in accordance with said lease and which gave him a right to restitution of payments already made.

Defendant alleges plaintiff's possession of the premises for re-rental to mitigate the rent together with defendant's abandonment of premises constitutes a surrender and further alleges that complete abandonment of the second floor of said premises was impossible without the services of the elevator and so complete abandonment of the premises was excused by virtue of lessee being held a captive tenant. Defendant alleges good faith in trying to settle differences with plaintiff and it was with possible settlement in mind that defendant made said deposits of rent. Defendant alleges that in view of plaintiff's previous bad faith in regard to matters concerning the sprinkler system of the premises defendant felt justified in withdrawing from the premises and suing for damages.

Defendant further alleges that plaintiff's action constituted a deprivation of the premises so bargained for by the terms of said lease and resulted in damages in the form of additional expense to defendant in the amount of Ten Thousand and Fifty (\$10,050.00) Dollars. This amount is composed of Eight Thousand Five Hundred and Fifty (\$8,550.00) Dollars spent by defendant as additional rent in securing substitute accommodations (the only substitute premises available were secured at a monthly rental of Twelve Hundred and Forty (\$1,240.00) Dollars, plus One Thousand Five Hun-

dred (\$1,500.00) Dollars additional expense incurred in moving defendant's property from the second floor of said premises without the services of the elevator.

Wherefore, defendant prays for judgment against plaintiff in the amount of Twenty-one Thousand Six Hundred (\$21,600.00) Dollars, together with reasonable attorney's fees and court costs.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1958.

---

[Title of District Court and Cause.]

### MOTION FOR CHANGE OF VENUE

Comes now the defendant above named by and through its attorney undersigned, and moves the court to change the venue of the above action to the United States District Court for the Northern District of California upon the grounds and for the following reasons, to wit:

(1) The convenience of all parties concerned in that the entire transaction upon which the claim and counterclaim are based took place in San Francisco, California.

(2) Plaintiff has filed suit in the trial court of the State of California at San Francisco; the issues

in said suit are identical with those in the above action against the Defendant and Defendant will be greatly inconvenienced if the venue of the above action is not changed.

Dated this 27th day of May, 1958.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 27, 1958.

---

[Title of District Court and Cause.]

### AMENDED ANSWER AND COUNTERCLAIM

Comes now the defendant in the above-entitled matter and, answering the Complaint on file herein, admits, denies and alleges the following:

#### I.

Defendant admits the allegations of Paragraphs I and II.

#### II.

Defendant denies the allegations set forth in Paragraphs III and IV.

#### III.

Answering Paragraph V, defendant denies that the sum of Seven Hundred Fifty (\$750.00) Dollars is a reasonable figure and alleges that any sum in



excess of Three Hundred (\$300.00) Dollars is unreasonable.

As for a second, separate and distinct defense, said defendant alleges the following:

I.

That defendant herein, as lessee, and plaintiff herein as lessor, entered into a written lease covering the premises referred to in plaintiff's complaint herein on January 15, 1953.

II.

That lessee has faithfully fulfilled its duties for many years in maintaining the elevator in accordance with the terms of the lease requiring it to maintain the elevator.

III.

That in and by the terms and provisions of said lease, the defendant, as lessee, did not have the duty to replace the elevator in whole or in part.

IV.

That in and by the terms and provisions of said lease the lessor has the duty to replace the elevator.

V.

That plaintiff was deprived of the premises by the loss of the use of the elevator in May of 1956, resulting in a failure of consideration as concerns defendant's liability.

## Counterclaim

For a Counterclaim to the Complaint of plaintiff herein, defendant alleges that between the 16th day of May, 1956, and the 15th day of July, 1957, the defendant paid to plaintiff Ten Thousand Fifty (\$10,050.00) Dollars. Defendant alleges a complete failure of consideration for deposits of rental so paid, which discharged him from his duty to continue payments in accordance with said lease, and which gave him the right to restitution of payments already made.

Defendant further alleges plaintiff's action constituted a deprivation of the premises so bargained for by the terms of said lease and resulted in damages in the form of additional expenses to defendant in the amount of Eleven Thousand Five Hundred Fifty (\$11,550.00) Dollars.

Wherefore, defendant prays for judgment against plaintiff in the amount of Twenty-one Thousand Six Hundred (\$21,600.00) Dollars, together with reasonable attorney's fees and Court costs.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1958.



[Title of District Court and Cause.]

INTERROGATORIES BY PLAINTIFF

To: Western Motor Service Corporation,  
Defendant:

The Plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who know the facts about which inquiry is made, and that the answers be served on Plaintiff within fifteen (15) days from the time these interrogatories are served on you:

Interrogatory No. 1:

State whether or not it is correct that the terms of the lease on which the complaint in this action is based called for payments of \$700.00 on the 15th day of February, 1957, and a like sum of \$700.00 on the 15th day of each and every succeeding month thereafter to and including the 15th day of December, 1957.

Interrogatory No. 2:

If the answer to Interrogatory No. 1 is in the negative, please specify wherein the terms are incorrect.

Interrogatory No. 3:

State whether or not it is correct that no payments whatsoever were made under this lease by or on behalf of defendant for the periods commencing

August 15th, September 15th, October 15th, November 15th and December 15th, 1957, making a total sum of Thirty-five Hundred (\$3500.00) Dollars for rent which remains unpaid under the lease:

Interrogatory No. 4:

If the answer to Interrogatory No. 3 is in the negative, please state what payments were made on what date and if the total sum of Thirty-five Hundred (\$3500.00) Dollars is incorrect, what is the total amount of rent remaining unpaid?

Interrogatory No. 5:

Is it correct that the terms of the lease state that the lessee shall pay any increase in real estate taxes assessed by the City and County of San Francisco over said taxes so assessed for the fiscal year 1952 to 1953, and that such increase shall be deemed and considered to be additional rent under said lease?

Interrogatory No. 6:

If the answer to Interrogatory No. 5 is no, please state what the correct terms are.

Interrogatory No. 7:

Are the following increases in real estate taxes assessed by the City and County of San Francisco correct:

1955 to 1956.....	\$231.94
1956 to 1957.....	237.47
1957 to 1958.....	365.50

Interrogatory No. 8:

If the sums set forth in Interrogatory No. 7 are incorrect, state in what manner they are not correct and what the proper amounts are for each year so designated above.

Interrogatory No. 9:

Was the defendant in this action, Western Motor Service Corporation, the plaintiff in an action entitled "Western Motors Servicing Corporation vs. Land Development and Investment Co." and reported in 313 P.(2d) 927?

Interrogatory No. 10:

Is it correct that the defendant in that action is the same as the plaintiff herein?

Interrogatory No. 11:

Is it correct that said action reported in 313 P.(2d) 927 involved the same lease and the same elevator referred to by defendant herein in its answer?

Interrogatory No. 12:

If the answer to Interrogatory No. 11 is in the negative, please state with particularity what the differences are.

Interrogatory No. 13:

Is it correct that the defects of the elevator referred to in the above-mentioned declaratory judg-

ment action brought by the defendant herein are the same defects referred to in defendant's answer in this present action?

Interrogatory No. 14:

If the answer to Interrogatory No. 13 is in the negative, please state in detail with appropriate dates as to when the defects or breakdown occurred.

Dated this 16th day of December, 1958.

GUST, ROSENFELD, DIVEL-  
BESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 16, 1958.

—

[Title of District Court and Cause.]

### ANSWERS TO INTERROGATORIES

Comes now the defendant, Western Motor Service Corporation, and makes the following answers to Interrogatories propounded by the plaintiff herein:

1. Yes.
2. . . . .
3. Yes.

4. . . . .
5. Yes.
6. . . . .
7. We are unable to say as we have never been supplied 1957 and 1958 tax receipts.
8. . . . .
9. Yes.
10. Yes.
11. Yes.
12. . . . .
13. No.
14. The defects mentioned in the above declaratory judgment action were present in addition to other defects not previously mentioned. Exact dates are unavailable as to the defects and breakdowns but records are being gathered to clarify previous negotiations between plaintiff and defendant wherein plaintiff offered to pay fifty per cent of the elevator replacement costs and this offer was refused by defendant. Further investigation is being made through city and county offices to determine the exact dates of condemnation of the elevator.

WESTERN MOTOR SERVICE  
CORPORATION,

By /s/ LAWRENCE C. IVES,  
President.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

State of Arizona,  
County of Maricopa—ss.

On this, the 30th day of December, 1958, before me, Thomas F. Tobin, the undersigned officer, personally appeared Lawrence C. Ives, who acknowledged himself to be the President of Western Motor Service Corporation, a corporation, and that he, as such President, being authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the corporation by himself as President.

In witness whereof I hereunto set my hand and official seal.

[Seal]      /s/ THOMAS F. TOBIN,  
Notary Public.

My commission expires: 2-26-62.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 31, 1958.

---

[Title of District Court and Cause.]

### INTERROGATORIES BY PLAINTIFF

To: Western Motor Service Corporation,  
Defendant:

The Plaintiff requests that the following interrogatories be answered under oath by any of your officers competent to testify in your behalf who know the facts about which inquiry is made, and

that the answers be served on Plaintiff within fifteen (15) days from the time these interrogatories are served on you:

Interrogatory No. 1:

The answer of Defendant to Interrogatory No. 14 previously submitted and filed herein states: "The defects mentioned in the above declaratory judgment action were present in addition to other defects not previously mentioned \* \* \*" To clarify this answer in regard to the "other defects" you are asked: Is it true that these "other defects" existed at the time the declaratory judgment action was brought?

Interrogatory No. 2:

Did the Defendant use the elevator after the breakdown complained of in the declaratory judgment action?

Dated this 16th day of January, 1959.

GUST, ROSENFELD, DIVEL-  
BESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,  
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 19, 1959.



[Title of District Court and Cause.]

### ANSWERS TO INTERROGATORIES

Comes now the defendant, Western Motor Service Corporation, and makes the following answers to Interrogatories propounded by the plaintiff herein:

1. We are unable to say at this time as the complete records are in the possession of the City Safety Inspector for the City of San Francisco, California. We are attempting to secure these records in order to present them at the trial of this case.

2. No.

WESTERN MOTOR SERVICE  
CORPORATION,

By /s/ LAWRENCE C. IVES,  
President.

/s/ THOMAS F. TOBIN,  
Attorney for Defendant.

Duly verified.

[Endorsed]: Filed February 2, 1959.

---

[Title of District Court and Cause.]

### MOTION TO AMEND COMPLAINT

Comes Now the Plaintiff, by and through its attorneys, Gust, Rosenfeld, Divelbess & Robinette,



and moves the Court to amend the Complaint filed herein as follows:

I.

In Paragraph IV of Plaintiff's Complaint, change "Four Thousand Two Hundred (\$4,200.00) Dollars" to read "Three Thousand Five Hundred (\$3,500.00) Dollars"; change "Five Thousand and Thirty-four and 91/100 (\$5,034.91) Dollars" to read "Four Thousand Three Hundred Thirty-four and 91/100 (\$4,334.91) Dollars"; in the prayer change "Five Thousand and Thirty-four and 91/100 (\$5,034.91) Dollars" to read "Four Thousand Three Hundred Thirty-four and 91/100 (\$4,334.91) Dollars."

II.

In Paragraph V of Plaintiff's Complaint, change "Seven Hundred Fifty (\$750.00) Dollars" to read "Fifteen Hundred (\$1,500.00) Dollars."

Rule 15, Federal Rules of Civil Procedure.

GUST, ROSENFELD, DIVEL-  
BESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,  
Attorneys for Plaintiff.

[Endorsed:] Filed March 26, 1959.

---

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the Plaintiff, by and through its attorneys, Gust, Rosenfeld, Divelbess & Robinette, and moves the Court to grant Summary Judgment as follows:

I.

That Summary Judgment be granted for and on behalf of plaintiff for the rent as prayed for in plaintiff's Complaint and in accordance with the

“Motion to Amend Complaint,” attached hereto, on the grounds and for the reason that there exists between plaintiff and defendant no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

## II.

That Summary Judgment be granted for and on behalf of plaintiff for the increase in taxes, as prayed for in plaintiff’s Complaint, on the grounds and for the reason that there exists between plaintiff and defendant no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

## III.

That Summary Judgment be granted for and on behalf of plaintiff as prayed for in plaintiff’s Complaint, assessing attorney’s fees against defendant in such amount as the Court deems reasonable.

## IV.

That Summary Judgment be granted on behalf of plaintiff denying defendant’s Counterclaim on the grounds and for the reason that said Counterclaim fails to state a claim on which relief can be granted, and in the alternative there is no genuine issue of fact, and plaintiff is entitled to judgment as a matter of law.

Wherefore, plaintiff prays judgment with relief as is set forth in plaintiff’s Complaint, as amended, and in Plaintiff’s Answer to the Counterclaim.

GUST, ROSENFELD, DIVEL-  
BESS & ROBINETTE,

By /s/ LAWRENCE B. SMITH,  
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California,  
City and County of San Francisco—ss.

Morris Stulsaft, being first duly sworn upon his oath, deposes and says:

That he is the President of the Plaintiff in the above-entitled action; that he makes this affidavit in support of the Motion for Summary Judgment filed in this action, and states as follows:

1. That he has read a copy of the complaint filed herein and that in reference to the increased taxes to be paid under the provisions of the lease, the correct amounts of the increases for the years specified in real estate taxes assessed by the City and County of San Francisco are as follows:

1955 to 1956.....	\$231.94
1956 to 1957.....	237.47
1957 to 1958.....	365.50

2. That this affidavit is made for use as evidence on behalf of the plaintiff, Land Development and Investment Company, a California corporation, in support of its Motion for Summary Judgment in the above-entitled cause.

/s/ MORRIS STULSAFT.

Subscribed and Sworn to before me this 21st day of January, 1959.

[Seal] /s/ SALLY S. GERRING,  
Notary Public.

My Commission Expires: December 6, 1959.

[Endorsed]: Filed March 26, 1959.

---

In the United States District Court  
For the District of Arizona  
No. Civ. 2830 Phx.

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a California Corporation,  
Plaintiff,

vs.

WESTERN MOTORS SERVICE CORPORA-  
TION, a Nevada Corporation,  
Defendant.

#### ORDER FOR SUMMARY JUDGMENT

This cause came on to be heard on the Motion of plaintiff for a summary judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the court from the affidavit of Morris Stulsaft, President of plaintiff, and from the pleadings and interrogatories that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law, it is

Ordered, Adjudged and Decreed that summary judgment be entered in favor of plaintiff and against defendant for:

1. The sum of Three Thousand Five Hundred (\$3,500.00) Dollars as and for rent, together with interest thereon at the rate of six per cent (6%) per annum from April 15, 1959, until paid.

2. The sum of Eight Hundred Thirty-four and 91/100 (\$834.91) Dollars as and for additional rent due to increases in taxes, together with interest thereon at the rate of six per cent (6%) per annum from April 15, 1959, until paid.

3. The sum of Three Hundred Fifteen (\$315.00) Dollars, being the total amount of interest due on the five (5) installments of rent at six per cent (6%) per annum calculated from the times said installments became due, namely August 15, 1957, September 15, 1957, October 15, 1957, November 15, 1957, and December 15, 1957.

4. Attorney's fee in the sum of \$750.00.

5. Costs herein incurred, \$35.50.

Dated this 20th day of April, 1959.

/s/ DAVE W. LING,

United States District Judge.

Approved as to form:

/s/ THOMAS F. TOBIN,

Attorney for Defendant.

[Endorsed]: Filed and docketed April 20, 1959.

---

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Western Motor Service Corporation, a Nevada corporation, defendant

above named, hereby appeals to the Ninth Circuit from the Order, Judgment, and Decree granting plaintiff's Motion for Summary Judgment.

Dated the 22nd day of April, 1959.

/s/ THOMAS F. TOBIN,  
Attorney for Appellant Western Motor Service  
Corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 22, 1959.

. —————  
[Title of District Court and Cause.]

### CERTIFICATE BY CLERK

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of said Court, including the records in the case of Land Development and Investment Company, a California corporation, Plaintiff, versus Western Motor Service Corporation, a Nevada corporation, Defendant, numbered Civ-2830 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said



case, and that the attached copy of civil docket entries is a true and correct copy of the original thereof remaining in my office.

I further certify that the said documents constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Petition for Removal of Civil Action.
2. Complaint.
3. Answer and Counterclaim.
4. Amended Answer and Counterclaim.
- 4a. Answer to Counterclaim.
5. Defendant's Motion for Change of Venue.
6. Interrogatories by Plaintiff (2 documents).
7. Answers to Interrogatories by Defendant (2 documents).
8. Defendant's Trial Brief.
9. Motion to Amend Complaint.
10. Plaintiff's Motion for Summary Judgment.
11. Memorandum Opposing Motion for Summary Judgment.
12. Order for Summary Judgment.
13. Defendant's Notice of Appeal.
14. Appellant's Statement of Points.
15. Designation.
16. Civil Docket Entries of June 17, 1958; April 6, 1959, and of April 20, 1959, of entry of judgment.

I further certify that the sum of \$250.00 has been deposited in the Registry Fund of this Court by the Appellant on April 22, 1959, as cash cost bond on appeal.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 30th day of May, 1959.

[Seal] /s/ WM. H. LOVELESS,  
Clerk.

---

In the United States Court of Appeals  
For the Ninth Circuit

No. 16493

WESTERN MOTOR SERVICE CORPORA-  
TION, a Nevada Corporation,

Defendant-Appellant,

vs.

LAND DEVELOPMENT AND INVESTMENT  
COMPANY, a California Corporation,

Plaintiff-Appellee.

#### APPELLANT'S STATEMENT OF POINTS

In its appeal appellant in the above-entitled action intends to rely upon the point that the District Court erred in concluding that the appellee, plaintiff below, was entitled to Summary Judgment.

THOMAS F. TOBIN,  
Attorney for Defendant-  
Appellant.

[Endorsed]: Filed July 2, 1959.



At a Stated Term, to wit: The October Term A.D. 1958, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of San Francisco, in the State of California, on Monday, the third day of August, in the year of our Lord one thousand nine hundred and fifty-nine.

Present:

Honorable William Healy, Circuit Judge Presiding,

Honorable Stanley N. Barnes, Circuit Judge,

Honorable David L. Bazelon, Circuit Judge.

[Title of Cause.]

### ORDER GRANTING MOTION FOR STAY OF EXECUTION

Ordered motion of appellant for a stay of execution of the judgment of the District Court herein pending determination of the appeal presented by Mr. Hartley Fleishman, on behalf of counsel for appellant, and by Mr. Theodore Monnell, on behalf of counsel for appellee, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered said motion granted, and execution of judgment of the District Court herein stayed pending determination of the appeal upon condition that the appellant file with the clerk of this Court a superseas bond in the amount of Seven Thousand Dollars (\$7,000.00) conditioned as required by law.

[Endorsed]: No. 16493. United States Court of Appeals for the Ninth Circuit. Western Motor Service Corporation, Appellant, vs. Land Development and Investment Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 2, 1959.

Docketed: June 9, 1959.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.